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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-sixth session

SUMMARY RECORD (PARTIAL)** OF THE 494th MEETING

Held at the Vienna International Centre, Vienna,
on Monday, 5 July 1993, at 10 a.m.

Chairman: Mr. MOHAMMED (Nigeria)

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* No summary records were prepared for the 485th to 493rd meetings.

** No summary record was prepared for the rest of the meeting.

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent within one week of the date of distribution of this document to the Secretary of the Commission, room E0455, Vienna International Centre.

Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

The meeting was called to order at 10.20 a.m.

The discussion covered in the summary record began at 10.40 a.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add.1, A/CN.9/377, A/CN.9/378/Add.1)

Procedural matters

1. Mr. SAHAYDACHNY (Secretariat) drew attention to the report of the Working Group on the New International Economic Order on the work of its fifteenth session (A/CN.9/371), the annex to which contained the text of the draft Model Law as it had been adopted by the Group.

2. The Commission also had before it a draft Guide to Enactment of the Model Law which had been prepared by the Secretariat (A/CN.9/375) and which the Working Group had decided should accompany the Model Law after its adoption by the Commission. The purpose of the draft Guide was to assist legislators when considering the adoption of legislation based on the Model Law.

3. Comments from Governments on the draft Model Law were before the Commission in documents A/CN.9/376 and Add.1. In addition, the Secretariat had just received a communication in which the Government of the United Republic of Tanzania stated that it had no comments on the substance of the draft Model Law, but wished to commend the Working Group for its efforts in preparing the draft and to express the hope that the Model Law would assist developing countries in the conduct of their procurement transactions.

4. Concerning the possibility of work in the area of procurement of services, a subject not covered by the draft Model Law, the Commission had before it document A/CN.9/378/Add.1, which would be considered later in the session.

5. Mr. WALLACE (United States of America) said that the Commission would have to tackle three tasks: the consideration of proposals for substantive amendments to the draft Model Law, which his delegation hoped would be kept to a minimum; the work of drafting; and consideration of the draft Guide to Enactment. He would suggest that those three tasks be kept separate, with purely drafting matters left to a drafting group, so that the Commission meeting in plenary session could focus on matters of substance.

6. He would further suggest that a working party be set up to bring the draft Guide to Enactment into line with the Model Law as eventually adopted. The Guide would be crucially important for Governments when they came to consider the Model Law. However, it would be unfortunate if the Commission were to become bogged down over points of detail in the draft Guide instead of dealing with the more substantive issues arising from the draft Model Law itself.

7. Mr. HERRMANN (Secretary of the Commission) warned against departing from the Commission's normal practice by attaching particular importance to the draft Guide. The Commission had hardly ever approved a commentary on a final text adopted by it.

(Mr. Herrmann, Secretary of the Commission)

8. He also warned against referring too many substantive issues to a drafting group: experience had shown that that procedure did not in fact save time, because drafting groups tended to become a second battleground on contentious issues. It would be better to confine the drafting group to its traditional role, namely that of reviewing the agreed text in the Commission's six working languages. The review might well reveal differences of substance, but the drafting group would normally refer such differences back to the Commission.

9. Regarding the United States representative's suggestion that a working party be set up to adjust the draft Guide to Enactment, he said that, if a final text of the Guide was to be ready by the last day of the session, a great deal of work would be required. Since such a group would only be able to start work the following week at the earliest, however, it might be best to postpone a decision on that particular suggestion.

10. Mr. JAMES (United Kingdom) agreed that it was inadvisable to refer a large number of substantive issues to a drafting group. Such a group should concentrate on matters of language; if it were asked also to deal with points of substance, even minor ones, there was a danger that during the final week of the current session it would have to refer back to the Commission points on which there had been disagreement. It would be better to discuss points of substance, both major and minor, in the Commission meeting in plenary session; any drafting group set up by the Commission should deal with purely drafting matters.

11. Where the draft Guide to Enactment was concerned, he agreed with the United States representative that a working party should be set up to bring it into line with what was decided in Commission on the Model Law. That would be a purely technical function, however, and points of substance relating to the draft Guide ought to be discussed by the Commission meeting in plenary session.

12. The Working Group had considered it extremely important that the draft Guide should be adopted by the Commission, so that it would be seen as having the endorsement of the Commission itself and not merely that of individual members.

13. Mr. SOLIMAN (Egypt) and Mr. TUVAYANOND (Thailand) agreed that the draft Guide should be adopted by the Commission as a whole.

14. Mr. MORAN BOVIO (Spain), agreeing with the representative of the United Kingdom that the discussion of substantive issues should take place in plenary session, suggested that the Commission should consider the draft Model Law and the draft Guide in parallel.

15. Mr. LEVY (Canada) said he could not recall a decision by the Working Group that the draft Guide should be adopted by the Commission, although he had no objection to such a course of action. In his view, it would be sufficient if the Guide were published as a Secretariat document after being brought into line with the Model Law as adopted by the Commission.

(Mr. Levy, Canada)

16. His concern was that the task of finalizing and adopting the Model Law might not be completed within the available time. Unlike the Working Group, the Commission had before it the comments of Governments which would have to be taken into account. He therefore believed that the draft Guide should not be considered at the same time as the draft Model Law, but left to later in the session, if time permitted.

17. Mr. WALLACE (United States of America), noting that he knew of one case of a country with an economy in transition where injudicious use of the draft Model Law had occurred, said he hoped that the Guide would receive the imprimatur of the Commission. The Guide needed prestige, and departure from precedent, with the Commission formally adopting it, was therefore desirable.

18. With regard to procedure, he believed that, provided the members of the Commission exercised discipline, the draft Model Law and the draft Guide could be considered together. The idea behind his suggestion that a working party be set up was that the working party should deal with inconsistencies between the draft Model Law and the draft Guide

19. Mr. GHAZIZADEH (Islamic Republic of Iran) said he considered that the draft Model Law and the draft Guide should be discussed together by the Commission meeting in plenary session and that the Guide should be adopted by the Commission.

20. Mr. GRIFFITH (Observer for Australia) said that the Commission's basic task was to finalize the text of the draft Model Law. If there was time thereafter, the draft Guide could be discussed. He did not think the Commission should try to finalize both together and preferred the approach indicated by the representative of Canada.

21. Mr. TUVAYANOND (Thailand) said that experience had shown that commentaries like the draft Guide were very important in interpreting conventions and model laws. He therefore believed that the draft Guide should be adopted by the Commission.

22. Mr. KOMAROV (Russian Federation) said that the legislators in some countries would need to draw on the experience of other countries, so that the Guide would be important for them. Adoption by the Commission would ensure that the Guide was more authoritative. He believed that it would be possible to deal with the draft Model Law and the draft Guide together within the available time.

23. The CHAIRMAN said that the Working Group had not decided that the draft Guide should be adopted by the Commission, although adoption would be useful. He believed that the Commission should first focus on the the text of the Model Law, the comments submitted by Governments and the amendments proposed by the Secretariat. At a later stage, if there was time, a decision could be taken on whether to consider the draft Guide. In the absence of objections, he would assume that the Commission wished to proceed on that basis.

24. It was so decided.

25. Mr. GRIFFITH (Observer for Australia), referring to document A/CN.9/378/Add.1, said that future work on the procurement of services might call for amendments or additions to the Model Law.

26. The CHAIRMAN said that future work on the procurement of services might indeed have such an impact, but that it was not a matter for substantive consideration at present.

Consideration of draft Model Law on Procurement

Title

27. Mr. SAHAYDACHNY (Secretariat) drew the Commission's attention to the Secretariat proposal, contained in document A/CN.9/377, to amend the full title of the Model Law to read "UNCITRAL Model Law on Procurement", in line with the titles of other model laws formulated by the Commission.

28. Mr. WALLACE (United States of America) wondered whether it might not be preferable to amend the title to "United Nations Model Law on Procurement".

29. Mr. HERRMANN (Secretary of the Commission) said that all model laws hitherto adopted by the Commission were known as UNCITRAL model laws.

30. Mr. GRIFFITH (Observer for Australia) said that, as well as reflecting 25 years of precedent, a reference to UNCITRAL in the title would enable the Commission to take deserved credit for the authorship of the text.

31. Mr. TUVAYANOND (Thailand) said that a reference to UNCITRAL in the title would highlight the technical nature of the Model Law in a way that a reference to the United Nations would not.

32. Mr. LEVY (Canada) said that, in his opinion, reference to a model law as a "United Nations Model Law" would constitute a serious departure from precedent.

33. The CHAIRMAN said he took it that the Commission wished to amend the full title to read "UNCITRAL Model Law on Procurement".

34. It was so decided.

35. Mr. SAHAYDACHNY (Secretariat) drew attention to the Secretariat proposal, contained in document A/CN.9/377, for a footnote to be added referring to the Guide to Enactment of the Model Law.

36. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the Secretariat proposal.

37. It was so decided.

38. Mr. WALLACE (United States of America) said that the addition of a footnote referring to the Guide to Enactment of the Model Law raised the question of the format to be adopted for publication of the Model Law and the Guide. Some favoured publishing such texts in separate documents; others felt

(Mr. Wallace, United States of America)

it wiser to publish them in a single document - in which case the question arose of whether the various provisions and the commentaries thereon should be set out together on an article-by-article basis.

39. Mr. TUVAYANOND (Thailand) said that there were many precedents for adopting a format in which each provision was immediately followed by the commentary thereon.

40. The CHAIRMAN said that discussion of the question of the best format for publication of the Model Law and the Guide to Enactment should be deferred until consideration of their substance had been completed.

Preamble

41. The Preamble was adopted.

Article 1

42. Mr. WALLACE (United States of America) asked whether the Commission would be prepared to consider deleting subparagraph (2) (a) of article 1, which provided that the Law would not apply to procurement involving national security or national defence. With the end of the Cold War, there seemed no reason why military procurement should continue to be treated separately from non-military procurement. Subparagraph (2) (a) could be deleted on the understanding that some Governments might wish to specify military procurement under subparagraph (2) (b), while others might wish to exclude it through procurement regulations (subparagraph (2) (c)). To subject military procurement to the same discipline as other types of procurement would have a salutary effect.

43. Mr. LEVY (Canada), expressing surprise at the fact that the United States delegation had put forward such an idea orally and not with written comments submitted in advance to the Secretariat, said his Government believed that national security was an issue of sufficient significance to merit separate treatment, and, furthermore, to figure prominently in paragraph (2).

44. Mr. GRIFFITH (Observer for Australia) saw merit in the idea, but felt that it would be difficult to introduce an amendment as far-reaching as the deletion of subparagraph (2) (a) at such a late stage. Perhaps, with a view to securing the widest possible application of the Model Law, a note should be inserted in the final text of the Guide to Enactment indicating that the exclusions pursuant to paragraph (2) should be as few as possible.

45. Mr. TUVAYANOND (Thailand) said that for many countries military procurement remained a sensitive issue, for the cessation of the Cold War did not mean an end to threats of external aggression. He did not think that subparagraph (2) (a) should be deleted.

46. Mr. JAMES (United Kingdom), endorsing the remarks made by the representative of Canada, said that countries should be persuaded to accept the Model Law - not deterred by fear that it would apply to their defence procurement. Subparagraph (2) (a) should be retained. In the Guide to

(Mr. James, United Kingdom)

Enactment, however, it could be made clear that States were not being enjoined to exclude defence procurement.

47. Alternatively, paragraph (3) of article 1 could be amended to read: "This Law applies to the types of procurement referred to in paragraph (2) of this article where and to the extent that the procurement regulations expressly so declare or that the procuring entity expressly so declares to suppliers and contractors". In that way, an enacting State could, by means of procurement regulations, include defence procurement within the purview of national legislation based on the Model Law.

48. Mr. KOMAROV (Russian Federation) agreed that subparagraph (2) (a) should be retained. The draft Guide to Enactment made clear the general line which legislators should take with regard to exclusions.

49. Mr. PHUA (Singapore), agreeing with views expressed by the representative of Thailand, said that subparagraph (2) (a) should remain, together with an indication that it need not be included in national legislation based on the Model Law.

50. Mr. LEVY (Canada), responding to the remarks made by the representative of the United Kingdom, said he would have no objection to amending paragraph (3) provided that the amended text referred both to the procurement regulations and to the procuring entity. It would then be quite clear that, even if the procurement regulations were to provide for certain exceptions, the procuring entity would still have the authority to add to them. If there were nothing in the regulations, the procuring entity could on its own decide to increase the extent of the exceptions because, in the light of the particular procurement, it would not see any problem. In that way, the regulations could provide for a basic minimum of exceptions to which the procuring entity could still add.

51. The CHAIRMAN, summing up the discussion, said that, whether or not a reference to "procurement involving national security or national defence" was included, procurement for security and defence would in most States continue to be conducted outside the purview of the national legislation on procurement; one should therefore probably make it clear that that was allowed. At all events, the Commission appeared to take the view that subparagraph (2) (a) should be retained and that necessary clarifications should be given in the Guide to Enactment.

52. Mr. WALLACE (United States of America), accepting the Chairman's summary, said that he had probably been premature in suggesting that, with the end of the Cold War, military procurement need not be treated separately from non-military procurement; it was still a sensitive matter, but perhaps it should not remain so. The draft Model Law represented a major step forward in that it treated international and domestic procurement in essentially the same way, and the day might come when military procurement was treated like any other type of procurement. Article 1 was perfectly satisfactory as it stood, but agreement on the suggested deletion would have represented a further step forward.

53. The CHAIRMAN, thanking the United States representative for his spirit of compromise, took it that the Commission wished to retain subparagraph (2) (a).

54. Article 1 was adopted.

Article 2

55. Mr. SAHAYDACHNY (Secretariat) proposed that paragraph (g) be modified in order to cover functions of a "tender security" besides the one referred to in the draft Model Law. Such other functions were, in particular, providing for a situation where a tender was withdrawn or modified after the deadline for submission of tenders and providing for a situation where the supplier or contractor winning the procurement contract failed to supply any performance guarantee required under the contract - two situations envisaged in subparagraph (1) (f) of article 27. The proposal was spelled out in the Note by the Secretariat contained in document A/CN.9/377.

56. Mr. LEVY (Canada), welcoming the proposal, said that a formulation such as "to secure fulfilment of certain obligations" was nevertheless too vague. The functions of a "tender security" should be listed briefly.

57. Mr. SAHAYDACHNY (Secretariat) asked whether, in the interest of conciseness, a formulation could be used which spoke of securing obligations referred to in subparagraph (1) (f) of article 27, although no such cross-reference for purposes of definition appeared elsewhere in article 2.

58. Mr. LEVY (Canada) said that he could agree to a cross-reference, but would prefer to avoid it. Perhaps the Secretariat could reflect on the matter and then advise the Commission. His only concern was the avoidance of vagueness.

59. The CHAIRMAN, noting that the Secretariat would reflect on the matter, suggested that the Commission consider article 2 paragraph by paragraph.

60. Paragraphs (a) and (b) were adopted.

61. Ms. ZIMMERMAN (Canada) said it might be useful to reconsider the definition of "goods" in paragraph (c) with a view to addressing concerns reflected in documents A/CN.9/376 and A/CN.9/376/Add.1. For example, printing was regarded as a service in a number of Canadian provinces and as a good in others; similar difficulties might be encountererd in other States.

62. Modification of the definition might be needed in order to provide for the inclusion by States in their national legislation of some things not mentioned in paragraph (c) and for the exclusion of some things which States felt should be expressly excluded. Transparency would be added if the inclusions and exclusions were specifically referred to, use perhaps being made of square brackets. The likelihood of disputes about whether or not something fell within the scope of the definition of "goods" might also thereby be reduced.

The meeting rose at 12.35 p.m.